3. The Appeals

Petitioners appealed the dismissal of their complaint to the Court of Appeals for the District of Columbia Circuit. In a per curiam opinion, the court of appeals affirmed the district court's dismissal of the complaint. In doing so, the court of appeals rejected Petitioners' argument that Congress' prohibition of a commuter tax should be subjected to strict scrutiny and held that "the commuter tax restriction does not violate equal protection or the Uniformity Clause of the Constitution." *App.* at 16a. The court of appeals concluded that because, "[i]n governing the District, Congress can 'exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes' . . . it undoubtedly has the authority to enact taxes for the District alone, just as a state could." *App.* at 12a-13a (quoting *Palmore*, 411 U.S. at 397). It explained further that

> [t]he commuter tax restriction is more properly viewed as simply an aspect of Congress' authority to levy local taxes on the District and therefore entirely consistent with the Uniformity Clause. Congress has delegated to the District government the power to levy an income tax while restricting the kinds of income the District may tax.

App. at 15a. Finally, the court of appeals rejected Petitioners' Equal Protection argument because it ignored "the special character of the District under the Constitution." *App.* at 10a.

REASONS FOR DENYING THE WRIT

Certiorari should be denied for two reasons. First, the Petitioners' legal theory not only has no basis in the Constitution but is contrary to it. Second, even if there were some basis for Petitioners' novel legal theory, they lack standing to challenge Congress' action.

I. THE FACT THAT THE DISTRICT IS NOT A STATE DOES NOT WARRANT STRICT SCRUTINY.

Petitioners ask this Court to review the decision below only insofar as the Court of Appeals declined to subject the challenged legislative action to strict scrutiny. Yet, strict scrutiny is appropriate only where the government has taken action that either relies upon suspect classifications or impinges upon a fundamental right. *See Vacco v. Quill*, 521 U.S. 793, 799 (1997); *Massachusetts Bd. of Retirement v. Mulgia*, 427 U.S. 307, 312 (1976). Those circumstances are not present here. Though Petitioners labor mightily to fit the square peg of the challenged legislation into the round hole of government action that requires strict scrutiny, the effort cannot succeed. It cannot succeed because at its foundation is the premise that the law of taxation, as it applies to Congress and the States, applies the same to Congress and the District. This premise is false. As a matter of constitutional structure neither the District nor its residents have the same rights to tax – or to be taxed – as States and the residents of States. The Petition for Certiorari should be denied.

A. Because the District Has Unique Constitutional Status, It May Be Treated Differently than States Without Raising Equal Protection Concerns.

As the area designated by the Constitution as "the seat of the government of the United States," the District is unique among American cities. U.S. Const. art. I, § 8, cl. 17. It is "the very heart of the Union itself, to be maintained as the 'permanent' abiding place of all its supreme departments, and within which the immense powers of the general government were destined to be exercised. . . ." *District of Columbia v. Carter*, 409 U.S. 418, 432 (1973) (quoting *O'Donoghue v. United States*, 289 U.S. 516, 539 (1933)). It is "truly *sui generis* in our governmental structure." *Carter*, 409 U.S. at 432. Thus, it is beyond question that the District is "constitutionally distinct from the States." *Palmore*, 411 U.S. at 395.

The unique situation of the District, particular aspects of which are offered by Petitioners in support of the application of strict scrutiny to the federal legislation they challenge, is a set of circumstances created for the District by the Constitution itself. Such constitutionally established circumstances: (1) that Congress has exclusive power to legislate for the District on all subjects, in spite of its dual role and the potentially competing interests of its members; and (2) that the District does not have a representative in Congress and therefore does not have a vote in the legislature that legislates for it, simply cannot render Congressional legislation for the District subject to strict scrutiny. Only if the District and its residents were clothed with the rights and protections accorded to the States – by virtue of their separate sovereignty – could Petitioners' arguments succeed. However, the Constitution

is to the contrary on this point. It grants the attributes of sovereignty to the National Government only, and preserves them to the States. It does not bestow them upon the District created to serve as the seat of the National government. Indeed, to do so would be to encourage the very danger that the Seat of Government Clause was adopted to prevent: that the National Government would sit and conduct its affairs in a location subject to and dependant upon a sovereign power other than its own, and thus be subject to neglect or difficulty at the whim of that power.[3] *See The Federalist No. 43* at 240-41.

Congress' exclusive legislative authority, pursuant to the Seat of Government Clause, is distinct from its limited authority to legislate for the Nation. In our system of dual sovereignty, when Congress legislates for the Nation, there are boundaries it cannot go beyond without violating the sovereignty of the States. No such boundaries constrain

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[3] The indispensable necessity of complete authority at the seat of government carries its own evidence with it. It is a power exercised by every legislature of the Union, I might say of the world, by virtue of its general supremacy. Without it not only the public authority might be insulted and its proceedings interrupted with impunity, but a dependence of the members of the general government on the State comprehending the seat of the government for protection in the exercise of their duty might bring on the national councils an imputation of awe or influence equally dishonorable to the government and dissatisfactory to the other members of the Confederacy. This consideration has the more weight as the gradual accumulation of public improvements at the stationary residence of the government would be both too great a public pledge to be left in the hands of a single State, and would create so many obstacles to a removal of the government, as still further to abridge its necessary independence.

The Federalist No. 43, at 240.

Congress' power when it legislates for the District. Thus, Congress is empowered to act in dual capacities, not only as the federal legislature acting for the citizens of the Nation, but also as the District's legislature, acting for the citizens who reside there. This is true notwithstanding the fact that the District is not represented in Congress. *App.* at 10a. ("[T]he fact that District residents do not have congressional representation does not alter that constitutional reality."). Unlike the New Hampshire legislature in *Austin v. New Hampshire*, 420 U.S. 656 (1975) (invalidating, under the Article IV Privileges and Immunities Clause, a New Hampshire commuter tax on the grounds that out-of-state residents who worked in New Hampshire paid taxes on income earned there, whereas New Hampshire residents did not), Congress is not "a foreign sovereign" in relation to the residents of the District. Therefore, Congress' power to tax with regard to the District is not limited as if it were.

To the extent the District's local government enjoys taxing power at all, it is by virtue of a delegation from Congress, not by virtue of the sort of sovereign authority possessed by the States. *See Allied Stores, Inc. v. Bowers*, 358 U.S. 522, 527 (1950) ("When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government of violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests."). That Congress has expressly declined to delegate the power to tax some particular income earned in the District – the income of non-residents who work there – simply does not implicate the same interests protected in *Austin* or addressed in *Wheeling Steel Corp. v. Glander*,

337 U.S. 562 (1949), *Allied Stores*, 358 U.S. at 522, or *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985). The interests addressed in those cases flowed from the separate sovereignty of the several States in our constitutional structure. Similarly, the decisions in *McCulloch v. Maryland*, 17 U.S. 316 (4 Wheat.) (1819) and *South Carolina Highway Dep't v. Barnwell Bros.*, 303 U.S. 177 (1938), involved the relative power of the States to reach beyond their own citizens with their sovereign powers. Neither has any relevance to – or places any limitation on – the power of Congress to legislate for the District pursuant to the Seat of Government Clause.

Like citizens of a locality within a State who have no fundamental right to be free from taxes imposed uniquely and pursuant to delegated power by their local government, residents of the District do not have any fundamental right to be free from a tax burden imposed by the acts of their own legislature. Nor do they have any right to share that burden with those who are non-residents of the Nation's Capital. At best, such unique treatment by a State, or by a local government empowered by a State, would be subject to rational basis scrutiny; so to, when Congress exercises – or delegates – its power to tax or not, pursuant to the Seat of Government Clause. Whatever the present day equities of the District's circumstances have become, Petitioners' effort is entirely without foundation in the law and therefore the Petition must be denied. Only by constitutional amendment can such a change be wrought.

B. The Uniformity Clause Does Not Apply To Congress' Taxation Legislation for the District.

Finally, the Constitutional creation of the District, as the seat of the National Government and a national city belonging to all of the citizens of the Nation, cannot create a suspect class, comprised of the District's residents, when Congress treats them differently than the residents of the several States. It is precisely this difference that the Founders contemplated. The very point of having a National Capital was to subject that location to Congressional rather than State authority for the benefit of the National Government. Thus, the Constitution anticipates that Congress will weigh both local and national interests when it legislates for the seat of the National government. That national considerations, rather than local ones, might in the end control Congress' decisions pursuant to its authority under the Seat of Government Clause does not render residents of the District a suspect class, or deprive them of any fundamental constitutional right, because the fact of their different treatment is contemplated by, and incorporated in, the Constitution itself. The District was, after all, created in the national interest; that it is in some particular aspect governed in the same way – in favor of the interests of all the citizens of all the States, rather than in the sole interest of the residents of the District – simply cannot violate the Uniformity Clause.

II. PETITIONERS LACK ARTICLE III STANDING TO BRING THEIR CHALLENGE.

Even if the District's dilemma did raise an important and undecided constitutional issue in need of this Court's consideration, this would not be the proper case in which

to examine the question. Before deciding any matter presented to it, a federal court must assure itself that it has jurisdiction to entertain the claim. It is not at all clear that these Petitioners satisfy the three prong test for Article III standing.[4] *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-5 (1998). Moreover, "only when adjudication is 'consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process'" should federal courts exercise their power – and then only as a last resort and a necessity. *Flast v. Cohen*, 392 U.S. 83, 97 (1968); *Chicago & Grand Trunk Ry. Co. v. Wellman,* 143 U.S. 339, 345 (1982).

The District, its City Council, the members of City Council and the Mayor (the "Government Petitioners"), as public entities and office holders, respectively, exist only by virtue of Congress' exercise of its Constitutional authority under the Seat of Government Clause. Thus, this action by the Government Petitioners, against Congress and other Federal agencies and officials, is no more than a complaint – by a creation of Congress – about the terms of its creation. Such a dispute is a purely political question. It does not implicate constitutional limitations and is in no

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[4] Pursuant to Article III of the Constitution, federal jurisdiction requires: (1) a concrete and particularized "injury in fact" that is actual or imminent; (2) that the injury be fairly traceable to the challenged action; and (3) that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000); *Steel Co.*, 523 U.S. at 103; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

way amenable to the subject matter jurisdiction of federal courts.[5]

Petitioners who are individual residents of the District allege as injury higher taxes and local revenue deficiencies. These complaints are available to all of the citizens of the District and, thus, state no cognizable injury. They do not identify any particularized harm specific to any individual, but support only a generalized "taxpayer" sort of standing generally disfavored by the courts. *Flast*, 392 U.S. at 102 ("[A] taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I § 8 of the Constitution.").

Assuming, however, that higher taxes and local revenue deficiencies somehow satisfy the injury prong of Article III standing, the allegations of the complaint probably state the necessary causal connection between those injuries and Congress' decision to withhold power to impose a commuter tax to satisfy the second prong. However, it is impossible to predict whether the relief sought by Petitioners – a declaration that Congress' prohibition of a commuter tax was unconstitutional – would provide any remedy at all for those identified injuries. In spite of the District's commitment to adopt a commuter tax if permitted to do so, given Congress' long history of rejecting imposition of such a tax itself, it is quite possible that Congress would simply respond by withdrawing the power to impose any income tax from the District. This assumes,

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[5] Because they decided that the plaintiffs who were District residents satisfied the requirements of Article III standing, neither the district court nor the court of appeals addressed the question of the standing of the Government Petitioners.

also, that Congress would not respond to the District's adoption of a commuter tax by simply vetoing or repealing any such tax, but rather would seek to correct the constitutional flaw declared by the Court rather than repeating it.

Moreover, there is no assurance whatsoever that the revenue generated by a commuter tax would result in reduction of the income tax rates imposed upon residents of the District. Indeed, it is in no way certain that additional revenues would be recognized, much less expended to reduce the "structural deficit" or infrastructure. It is entirely possible, even likely, that the imposition of a non-resident income tax would result in decisions by businesses to relocate just across the Potomac River, where prices – and local tax rates – would be lower.

Likewise, to assume that any additional revenues that might be recognized – over whatever time period they could be sustained – would result in a reduced tax burden on residents of the District is to assume that more attractive opportunities for economic development or investment would not present themselves and that City Council would resist them if they did. The series of independent business and political choices necessary before the imposition of a commuter tax in the District might remedy the injuries complained of is altogether too speculative a series of events to support Article III standing. It also serves to highlight the fundamentally political nature of Petitioners' complaint – a complaint which, at its heart, is subject only to political solution, not the jurisdiction of a federal court.

CONCLUSION

The Petition for a Writ of Certiorari should be **DENIED**.

Respectfully submitted,

ROBERT F. MCDONNELL
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

April 5, 2006

WILLIAM C. MIMS
Chief Deputy Attorney General

MAUREEN RILEY MATSEN
Deputy Attorney General

D. MATHIAS ROUSSY, JR.
Assistant Attorney General

Counsel for the Commonwealth of Virginia

(3)

No. 05-970

IN THE

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JAMES M. BANNER, JR., ET. AL.,

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v.

THE UNITED STATES OF AMERICA, ET. AL.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court of
Appeals for the District of Columbia

BRIEF OF THE STATE OF MARYLAND IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

J. JOSEPH CURRAN, JR.
Attorney General of Maryland
MICHAEL D. BERMAN*
Deputy Chief of Litigation
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6345

*Counsel of Record

Attorneys for the State of Maryland

QUESTION PRESENTED

Did both courts below correctly reject application of a heightened standard of scrutiny to the District of Columbia's challenge to a taxation provision of the Home Rule Act, in light of Congress's undisputed plenary power over the District under the "Seat of Government" clause to the Constitution?

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No. 05-970

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BRIEF OF THE STATE OF MARYLAND IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Procedural Status

The District of Columbia (the "District") sued the United States, seeking to invalidate the portion of the 1973 Home Rule Act, D.C. CODE ANN. §1-201, *et seq.*, that prohibits it from

imposing a nonresident income tax (hereinafter the "prohibition"). That type of tax is commonly, but incorrectly, known as a "commuter tax."

Maryland and Virginia intervened as defendants. The trial court granted defendants' motion to dismiss.

In affirming that dismissal, the United States Court of Appeals for the District of Columbia recognized that "the Constitution grants Congress exclusive authority to govern the District, but does not provide the District representation in Congress." (App. A, 16a.). "That constitutional plan," the intermediate court concluded, "does not require heightened scrutiny of congressional enactments affecting the District." (*Id.*). Rather, "[t]he policy choices are Congress's to make." Therefore, the court held, "the commuter tax restriction does not violate equal protection or the Uniformity Clause of the Constitution." (*Id.*).

The District seeks to tax income earned in the District by nonresidents. The District admits, however, that the burden of that tax would fall on the States, Petit. at 8 n. 5, and, therefore, on taxpayers who do not work and earn income in the District. Yet, the District seeks to justify imposing this tax burden on citizens who do not work in the District, under principles of fairness and universality.

Contrary to the central asserted premise of the District's position, the prohibition on nonresident taxation is not discriminatory. As the courts below recognized, it is the product of sound policy based on the "Seat of Government" clause. U.S. Const., Art. I, §8, cl. 17. It is grounded in part on the federal treasury's support of the District. It also acknowledges the key fact that the District occupies land, worth billions of

dollars, that was ceded to the United States by Maryland. 45 Acts of Md. 1791. The District, having benefitted from this valuable gift, is now asking Maryland to maintain it for the District. The policy decision to reject that request is far from discriminatory.

The District contends that, due to the Congressional prohibition on nonresident taxation, an economic burden that should be shared with nonresidents is carried solely by District residents. Petit. at 3. This assertion is factually incorrect. Under the Revitalization Act, the entire Nation contributes to the operation of the District. That contribution amounts to billions of dollars.

Similarly, the District asserts that the prohibition on taxing nonresidents was enacted for the benefit of Congress's constituents. *Id.* It fact, it was enacted to further the historical role of the District as a location where the federal government could operate free of pressure from any states.

The District asserts that there is a generally accepted principle that income is taxed where it is earned. Although that principle arguably applies to each of the sovereign States, it does not apply to a municipality, which the District acknowledges itself to be. Complaint at ¶17 (App. D, 73a.). All fifty *states* have the inherent sovereign power to tax income where it is earned; however, subordinate units of government, such as the City of Rockville, Baltimore City, and Montgomery County, MD, do not have that inherent power. *Griffin v. Anne Arundel County,* 25 Md.App. 115, 126, 333 A.2d 612, 619, *cert. denied,* 275 Md. 749 (1975). The District, as a subordinate government, is in the same position as those subordinate governments. Thus, it incorrectly posits an aspect of State sovereignty, extrapolates a "universal" rule, compares

the powers of sovereign states to its powers as a city, and then asserts that it wrongfully lacks State power. It is the District's syllogism that is flawed, not the Home Rule Act.

B. Additional Facts

The District sits on land that was ceded by Maryland to Congress and the United States Government in 1789. 45 Acts of Md. 1791; D.C. CODE ANN. §1-101. In FY 2003, the land's value was $63 billion.[1] Maryland has also ceded property, income, sales, and other taxes arising on this land, and on its inhabitants and occupants, for more than two centuries. Absent Maryland's gift, the taxable value of the land and every tax dollar paid in the District since 1789 would belong to Maryland. Yet, the District now seeks more.

In 1783, Congress, sitting in Philadelphia, was besieged by unpaid soldiers. It sought help from Pennsylvania, which refused. The Framers realized that the national government had to be located on federal land so that Congress could protect itself and so that no state could obtain undue influence over Congress.[2] This leads to one basic factual conclusion: "The capital district was to be a national commons. . . ." W Cobb,

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[1]FY 2004 Proposed Budget and Financial Plan, http://cfo.dc.gov/budget/2004/pbfp.shtm.

[2]*E.g.*, HOME RULE FOR THE DISTRICT OF COLUMBIA 1973-1974 BACKGROUND AND LEGISLATIVE HISTORY OF H.R. 9056, H.R. 9682, AND RELATED BILLS CULMINATING IN THE DISTRICT OF COLUMBIA SELF-GOVERNMENT AND GOVERNMENTAL REORGANIZATION ACT, COMM. ON DISTRICT OF COLUMBIA, 93RD CONG., 2D SESS. (Comm. Print 1973) (hereinafter "BACKGROUND"), 3577.